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No. 73-796

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

UNITED STATES OF AMERICA - - - *Petitioner*

V.

DERL GRAY, - - - - - - - - - - - Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The respondent respectfully requests that the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has now been reported at 484 F. 2d 352 (6th Cir. 1973).

QUESTIONS PRESENTED

The respondent for the reasons stated hereinafter, is not satisfied with the statement of the questions

presented by the petitioner and therefore submits the following counterstatement of the questions presented:

I. Whether an affidavit is sufficient to support the issuance of a search warrant in respect to the "description of the premises to be searched" when that affidavit: (a) omits any mention of the county or state where the property is located, (b) places the property in the wrong quadrant of an intersection of two highways in a rural area not within any incorporated city, and (c) does not recite that said premises are in the possession of anyone, even "John Doe".

The Court of Appeals did not answer this question.

Respondent contends that this question should have been answered, "No."

II. Whether, assuming state troopers were legitimately in one's home pursuant to a search warrant for the seizure of alcoholic beverages and the officers observed two rifles in the back of a closet, but did not have probable cause to believe the rifles were evidence of a crime and could not have obtained a warrant for their seizure, the "plain view" doctrine permits those officers to pull out, examine, copy the serial numbers, run the serial numbers through the NCIC computer, and then obtain a warrant for the seizure of the rifles from the information obtained from the computer.

The Court of Appeals answered this question, "No."

The Respondent submits that the Court of Appeals answered this question correctly.

III. Whether the rule excluding from evidence items seized in one's home in violation of the Fourth

Amendment to the Constitution of the United States should be abolished.

The Court of Appeals did not answer this question in the above form, but did apply the exclusionary rule.

Respondent submits that this question should be answered, "No."

Issue I above has been added by the respondent because the petitioner has misinterpreted the decision of the Court of Appeals for the Sixth Circuit. On pages 3A-4A of the petitioner's appendix A, the opinion of the Court below, that Court stated:

> The defendant raises several issues on this appeal but upon oral argument of this case the question arose as to the propriety and effect of Trooper Brodt's actions in removing the rifles from the closet, examining them, and copying down the serial numbers pursuant to a warrant directing the seizure of alcoholic beverages. This question has now been briefed by the parties and *because we decide the case on the basis of this issue, we deem it unnecessary to discuss others.* (Emphasis added).

The Court of Appeals did not determine Issue I, it merely assumed the officers were on the premises legitimately for purposes of an analysis of the facts under the "plain view" doctrine. Correctly or incorrectly deeming a decision necessary or unnecessary is not making a decision.

Issue II is a more accurate statement of the issue in fact decided by the Court of Appeals than is question 1 presented by the petitioner.

Issue III as stated above makes the impact of what the petitioner states as question 2 more clear and removes the disguise furnished by the petitioner.

STATEMENT

With the exception of the affidavit used to obtain the original alcoholic beverage warrant, printed in the Appendix to this brief, the facts as stated by the United States Court of Appeals for the Sixth Circuit in its opinion below are fair and accurate. Respondent feels, however, impelled to restate some of the facts as presented by the petitioner in its statement.

State Trooper John Miller was not a resident of the local community, he was "more known" than Trooper Brodt in the community. (Tr. 52).

The premises in question were a combination store and dwelling house. The lower floor was being used as a store and the upper floor was being used as the living quarters of Mr. Gray, his common law wife, Mary Head, and Ms. Head's two children. (Tr. 13).

The search of the second floor living quarters and all of the matters pertaining to the rifles were carried out by the young, inexperienced Trooper Brodt, not Trooper Miller. (Tr. 16 and 17).

The rifles were in fact obtained by the troopers after Brodt threatened, without any basis, to charge a loved one of Mr. Gray with a serious crime unless they were given the rifles. (Tr. 36, 37 and 38).

ARGUMENT

I. RE SUFFICIENCY OF AFFIDAVIT.

This court will recall that there were two search warrants issued for the respondent's premises. The sufficiency of the affidavit (App. to this Brief) to

support the issuance of the first warrant is what the respondent is questioning. That first warrant was issued to enable the Kentucky State Police to search for and seize beer and other alcoholic beverages belived to be in the possession of the respondent for illegal purposes. Discovery of the two rifles, which are the subject of the case at bar, was made by a state officer, a Kentucky State Trooper, while executing this alcoholic beverage warrant. The second warrant was issued because of the knowledge acquired by the trooper during the first search, i.e., the probable cause necessary to obtain the second warrant resulted from the first search. "Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the search depends." *Whiteley v. Warden*, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971).

The question involved does not seem to be a question strictly of a violation of the respondent's Fourth and Fourteenth Amendment rights under the Constitution of the United States, since the search and seizure was performed by state officers and the trial took place in federal court on federal charges. The test is one of federal law derived from the Constitution, the statutes, and the principles of the common law, with an independent inquiry being made by the federal court. However, evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the respondent's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the respondent's timely objection in a federal criminal trial. *Elkins v. United States*, 364 U.S. 206, 4 L. Ed. 2d

1669, 80 S. Ct. 1437 (1960), and *United States v. Clarke*, 451 F. 2d 584 ((5th Cir. 1971). Thus, the Fourth Amendment states the test to be applied, even though it does not by itself technically provide the reason such evidence is inadmissible.

The pertinent portion of the Fourth Amendment to the Constitution of the United States reads as follows:

> . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched,* and the persons or things to be seized. (Emphasis added).

In the case at bar, the affidavit: (a) omitted any mention of the county or state where the property is located, (b) placed the property in the wrong quadrant of an intersection of two highways in a rural area not within any incorporated city, and (c) failed to mention that the premises were in the possession of anyone.

The rule that should be applied was very well stated by the Kentucky Court of Appeals, when it held:

> . . . An affidavit to be sufficient to support the issuance of a search warrant must recite facts in respect to the description of the property to be searched to enable the officer serving the warrant to locate the property with certainty, and also to enable the Magistrate issuing the warrant to determine that the property to be searched is within his jurisdiction. *Pigg v. Commonwealth*, 299 S.W. 2d 796 (1957), and *Baker v. Commonwealth*, 223 S.W. 2d 590 (1949).

This Kentucky rule seems to be within the arena of reasonableness that encompasses so much of the law.

This Court will notice that the *Kentucky* rule has two distinct degrees of specificity, each of which is very reasonable: (1) *Specific enough* to permit the officer serving the warrant to locate the property with certainty, and (2) *General enough* to enable the magistrate to determine that the property is within his jurisdiction.

In the case at bar, the magistrate had absolutely no way to know from reading the affidavit that the respondent's premises were within the area over which he had jurisdiction, i.e., Fayette County, Kentucky. In fact, the premises are nearly in Woodford County. The affidavit just does not meet degree No. 2 above. Furthermore, with the quadrant of the intersection wrong, an officer attempting to serve the warrant, who had never been to the premises, quite likely would question whether it met degree No. 1 above. The *Baker* case is particularly in point.

Though the "description" question is the gist of defendant's contention on this issue, this Court should also note a number of other weaknesses in this matter. First, the trooper enticed the defendant into a local liquor law violation; second, the affidavit requested a warrant to search only the store portion of the premises and the troopers extended the search into the dwelling portion of the premises; third, the Commonwealth of Kentucky, which pays the salaries of these officers, is, in effect, being denied the right to control their actions, and fourth, the Fayette Quarterly Court has already suppressed this evidence after finding the affidavit defective.

The District Court, in overruling defendant's various motions to suppress this evidence, relied on *United States v. Combs*, 468 F. 2d 1390 (6th Cir. 1972)

and *United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S Ct. 741 (1965). Both *Combs* and *Ventresca* seem to hold that in testing an affidavit as to the "probable cause" requirement, the Court should test same in a commonsense or reasonable manner, as opposed to a hypertechnical manner. The *Kentucky* rule has always been reasonable on the "description" issue. Defendant submits that "reasonable", "realistic", "commonsense" do not mean that the Fourth Amendment has been repealed or that there are no standards or minimum requirements for testing affidavits. It appears impossible to set standards low enough for the affidavit in the case at bar to receive a passing grade.

Thus, respondent submits that it is not at all clear that the troopers had any right at all to be on respondent's premises.

II. RE "PLAIN VIEW" DOCTRINE.

The seizure of the serial numbers from the rifles took place while the officers were acting pursuant to a search warrant to seize alcoholic beverages in a man's home. It is in this context that the "plain view" doctrine was applied by the Court of Appeals.

The applicable principle was stated by this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 at 466, 29 L. Ed. 2d 564 at 583, 91 S. Ct. 2022 (1971), in discussing the "plain view" doctrine:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification

> whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. *Of course, the extension of the original justification is legitimate only where it is "immediately apparent" to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.* (Emphasis added).

This Court in *Coolidge* cited the concurring opinion of Mr. Justice Stewart, Mr. Justice Brennan and Mr. Justice White, in *Stanley v. Georgia*, 394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). In *Stanley*, the defendant's home was searched under a warrant for the seizure of equipment, etc., used in an illegal wagering business. During the course of the search, the officers found some films in a drawer of the defendant's desk. The officers decided to view the films and after viewing the films for several minutes decided to arrest the defendant for possession of obscene material. Mr. Justice Stewart at Page 572 stated:

> To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

The viewing of a film by the officers in *Stanley* to determine if a crime was being committed seems perfectly analogous to running the serial numbers of

the rifles through the National Crime Information Center computer in the case at bar.

Thus, respondent submits that the Court of Appeals properly found that the "plain view" doctrine did not permit this search and seizure. To hold otherwise will legitimize the old "general" or "blanket" warrant that the Fourth Amendment was specifically designed to prohibit.

In the *Cady, Terry, Adams, Harris, Powers, Johnson, Cotton,* and *Graham* cases cited by the petitioner herein, the police were performing a legitimate function or had a legitimate reason for very limited searches which inadvertently produced incriminating evidence. In none of those cases were the police acting under a search warrant. In the case at bar, the young state trooper was not content to charge Mr. Gray with alcoholic beverage misdemeanors, he had to find something else. If the rifles had not been available, he would have no doubt taken the serial numbers off of Mr. Gray's stove, refrigerator and television.

Respondent therefore submits that this is not a proper case to grant certiorari upon the issues as construed by petitioner.

III. RE ABOLITION OF THE EXCLUSIONARY RULE.

The brief submitted by petitioner in *United States v. Robinson,* No. 72-936, cited in support of this issue does not adequately justify the social consequences that will result from abolition of the exclusionary rule.

In addition to being the only deterrent to lawless law enforcement, the exclusionary rule represents the

respect for the law that must be demonstrated by those who would enforce the law against others.

If the police and the courts do not demonstrate their respect for the law, how can we expect the American public to obey the law. The petitioner is requesting permission to violate the law, "just a little." With the present state of turmoil and division that exists in our country today, because certain of our leaders chose to violate the law, "just a little" and felt the "ends justified the means," the request of the petitioner appears untimely, if not ludicrous.

If the burden of proving that a violation of the Fourth Amendment was flagrant, willful, or substantial is placed upon a defendant, every competent defense attorney will be required to mount a personal attack against the policeman, rather than settling for a technical violation and closing the file.

Further, the modification of the rule as suggested by the petitioner will be too tempting for the police to resist. Every doubt will be resolved in favor of another intrusion on our liberty. The businessman is the one with something to lose. The pot-smoking youth of today will soon solve their problems with a voted appeal of the marijuana laws. The rest of us are going to have to live with such a mistake.

CONCLUSION

For the foregoing reasons and because the petitioner has failed to adequately demonstrate any reason under Rule 19 for grant of certiorari, the respondent prays this Court to deny the writ of certiorari.

Respectfully submitted,

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Attorney for Respondent

I hereby certify that three (3) copies of the foregoing Brief were served on the United States of America, by mailing same, air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, this the 12th day of December, 1973.

James A. Shuffett
Attorney for Respondent

APPENDIX

Affidavit for search warrant by Ed Brodt, Trooper Kentucky State Police.

Affiant Edward Brodt so states that on the 16th of July 1972 at 1:30 P. M he did buy or purchase 5 cans of Pabst Blue Beer at a cost of $.50 per can. This purchase was made at a combination store and dwelling house located at the junction of U. S. 421 and Yarnallton Road, situated on the west side of U. S. 421 and the north side of Yarnalltown Rd. Said property has parking area and gas pump in front of building. Affiant further states that he believes that this store is engaged in the illegal sale of alcoholic beverages and that there is reason to believe that it stored upon the premises additional alcoholic beverages, to-wit beer, whiskey, gin, ale or wine.

/s/ Ed Brodt

Subscribed and sworn to before me by Ed Brodt this 16th day of July 1972.

/s/ A. Norrie Wake
Judge, Fayette Quarterly Court